

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 9127 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

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MUSHRIKHAN @ GULLU BASHIRKHAN SHAIKH

Versus

COMMISSIONER OF POLICE

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Appearance:

MS DR KACHHAVAH for Petitioner

Mr. U.R. Bhatt, AGP for Respondents.

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CORAM : MR.JUSTICE H.R.SHELAT

Date of decision: 26/03/98

ORAL JUDGEMENT

The petitioner, at present under detention by this application under Article 226 of the Constitution of India calls in question the legality and validity of the order of detention dated 26th November 1997 passed by the Police Commissioner for the city of Ahmedabad invoking his power under Section 3 of the Gujarat Prevention of Anti-Social Activities Act (for short 'the Act').

2. The Police Commissioner for the city of Ahmedabad perusing the record found that about four complaints were

lodged with Vatva, Sarkhej, Odhav and Dani Limda police stations alleging that the petitioner committed the theft of pipe, drill machine, roller, motorcar, iron-bars, rings etc. After inquisition he knew that petitioner was a tartar or a decimator and by his several criminal activities he was committing wrongs and terrorising the people. No one was feeling safe & secured. Every one while in the house or in the public place was feeling insecure because of the fear of violence from the petitioner. The petitioner used to keep with him knife or other lethal weapons and make use of the same whenever any one tried to challenge him or chase him. No one was therefore ready to come forward against him and invite the trouble. The petitioner used to extort money by threat and cause extensive damage to the shopkeepers and others who refused to pay him amounts he demanded. Many times people had to seeing him close down the shutters and leave the place. Even seeing him people used to chevy and the public place often wore deserted look. In order to have some material before him, the Police Commissioner tried to record the statements of the witnesses but no one was willing to come forward. After great persuasion and when assurance was given that the particulars disclosing their identity would be kept secret, some of the witnesses showed their willingness to give statements. Those statements also revealed that the petitioner was a dangerous person and his activities were the challenge to the maintenance of the public order. Any how his activities were required to be curbed but in the general law it was found to be a futile exercise. Even externment order under the Bombay Police Act was found meaningless. The only way out was to pass the order of detention and detain the petitioner. Accordingly the order came to be passed and at present he is kept under detention. This petition is therefore filed by the petitioner challenging the legality and validity of the order of detention.

3. At the time of hearing, both the learned advocates made their submissions on different grounds, but later on they tapered off their submissions confining to the only ground namely exercise of privilege under Section 9(2) of the Act. I will, therefore, deal with the said point going to the root of the case and would not deal with other grounds.

4. It would be better if the law about the non-disclosure of certain facts is elucidated. Reading Article 22(5) of the Constitution of India, what becomes clear is that the grounds on which order of detention is passed are required to be communicated to the detenu.

The detenu is, therefore, required to be informed not merely factual inference and factual material which led to inference namely not to disclose certain facts but also the sources from which the factual material is gathered. The disclosure of sources can enable the detenu to draw the attention of the detaining authority in the course of his representation to the fact whether the factual material collected from such sources would be relied upon and used against him on the facts and circumstances of the case. Subject to the limitation mentioned in Article 22(6) of the Constitution of India and Section 9(2) of the Act, the detaining authority is of course empowered to withhold such facts and particulars, the disclosure of which he considers to be against the public interest. The privilege of non-disclosure has to be exercised sparingly and in those cases, where public interest dictating nondisclosure overrides the public interest requiring disclosure. Hence the detaining authority must be fully satisfied on the basis of overall study that the apprehension expressed by the informant is honest, genuine and reasonable in the circumstances of the case. With a view to satisfy itself whether the fear of violence and consequential feelings of insecurity or apprehension of a wrong would be done to them at any time by the detenu by those making statement against the detenu is imaginary or fanciful; or an empty excuse or well-founded for disclosing or not disclosing certain facts or particulars of those persons, the authority making the order has to make necessary inquiry applying his mind. What can be deduced from such constitutional as well as legal scheme whereunder obligation to furnish the grounds and the duty to consider whether the disclosure of any facts involved therein is against public interest are both vested in the detaining authority and not in any other. The authority passing the order of detention has to apply his mind and should itself be satisfied to the question whether or not the supply of the relevant particulars and materials would be injurious to the public interest. If the task of recording statements and necessary inquiry is entrusted to others, and if he mechanically endorses or accepts the recommendation of others or subordinate authority in that behalf without applying mind and taking his own decision, the exercise of power would be vitiated as arbitrary. What is further required is that the detaining authority must file his affidavit to satisfy the court that he had sincerely and honestly applied the mind for the bonafide exercise of the powers about disclosure and privilege regarding non-disclosure so that the court can examine rational connection between the ground disclosed or not disclosed in public interest. If

no affidavit explaining the exercise of the power is filed, the court can infer against the detaining authority. If the affidavit is filed explaining the exercise of the power, the detenu may challenge the privilege exercised on the ground that the same is vitiated by factual or legal malafides. For my such view, a reference to a decision in the case of Bai Amina, W/o. Ibrahim Abdul Rahim Alla Vs. State of Gujarat and others- 22 G.L.R. 1186 held to be the good law by the Full Bench of this Court in the case of Chandrakant N. Patel Vs. State of Gujrat & Others 35(1) [1994(1)] G.L.R. 761, may be made.

5. In view of such law, the authority passing the order has to satisfy the court that it was in the public interest absolutely necessary to keep the particulars of the witnesses secret keeping the safety of the witnesses in mind. It is pertinent to note that no affidavit has been filed by the authority passing the order. When that is so, it can well be assumed that there was no just cause to exercise the privilege and the Police Commissioner after perusing the record found that the fear expressed by the witnesses was imaginary and not genuine. The petitioner was under the circumstances entitled to have those particulars not given to him. For want of those particulars his right to make effective representation is jeopardised. Had he known the sources he could have in his representation stated whether those statements were reliable and why those witnesses were telling against him. When his such right to make effective representation has been jeopardised, the continued detention is arbitrary and illegal. The same is, therefore, required to be quashed.

6. For the aforesaid reasons, the application is allowed. The order of detention dated 26th November 1997 is hereby quashed and set aside. The petitioner is ordered to be set at liberty forthwith if no longer required in any other case. Rule accordingly made absolute.

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TRUE COPY

(R.M. Ravindran)  
Private Secretary  
to the Hon'ble Judge  
High Court of Gujarat

Ahmedabad